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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT JOHN HAMILTON,

Plaintiff,

v.

C. STEEB, et al.,

Defendants.

Case No. CV 17-5300 ODW (SS)

ORDER DISMISSING ACTION

WITH PREJUDICE PURSUANT TO

FEDERAL RULE OF CIVIL

PROCEDURE 41(b)

I.

INTRODUCTION

On March 22, 2018, Plaintiff, a California state prisoner proceeding pro se, filed a Second Amended Complaint ("SAC") in the above-captioned civil rights action. (Dkt. No. 15). Due to the SAC's various pleading deficiencies, on June 15, 2018, the Court dismissed the SAC with leave to amend.¹ The Court's Order set a

¹ A magistrate judge may dismiss a complaint with leave to amend without the approval of a district judge. See McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991) ("[T]he dismissal of a complaint with leave to amend is a non-dispositive matter."). Pursuant to Federal Rule of Civil Procedure 72, a plaintiff who disagrees with a magistrate judge's order dismissing a pleading with leave to

1 deadline of July 15, 2018 for Plaintiff to file a Third Amended
2 Complaint if he wished to pursue his claims. (Dkt. No. 17).
3 Plaintiff subsequently requested an extension, (Dkt. No. 18), which
4 the Court granted. (Dkt. No. 20).

5
6 Because Plaintiff failed to file a Third Amended Complaint by
7 the Court's extended deadline, on October 29, 2018, the Court
8 issued a Report and Recommendation recommending that this action
9 be dismissed for failure to prosecute and obey Court orders. (Dkt.
10 No. 26). Plaintiff filed Objections to the Report and
11 Recommendation in which he repeated some of the allegations
12 underlying his claims, but did not indicate whether or when he
13 intended to file a Third Amended Complaint. ("Obj.," Dkt. No. 34).
14 After filing the Objections, Plaintiff attempted to file a number
15 of different documents, all of which were rejected either because
16 they were nonsensical and it was impossible for the Court to
17 understand what Plaintiff was attempting to file, or because they
18 were motions that were premature because there was no operative
19 complaint. (Dkt. Nos. 29-33, 35-38).

20
21 Nonetheless, because Plaintiff's attempted filings appeared
22 to suggest that Plaintiff might not have lost interest in this
23 litigation, on January 28, 2019, the Court sua sponte granted
24 amend may file an objection with the district judge. See Bastidas
25 v. Chappell, 791 F.3d 1155, 1162 (9th Cir. 2015); see also Hunt v.
26 Pliler, 384 F.3d 1118, 1124 (9th Cir. 2004) ("District court review
27 of even these nondispositive matters . . . can be compelled upon
28 objection of the party against whom the magistrate has ruled.")
(quoting McKeever, 932 F.2d at 798). Here, Plaintiff did not
timely challenge any of the magistrate judge's dismissal Orders
with the undersigned district judge.

1 Plaintiff an additional fourteen days in which to file either: (1)
2 a Third Amended Complaint (and the Court ordered Plaintiff to file
3 his Third Amended Complaint by that deadline), or (2) a declaration
4 of his intention to stand on the claims and allegations in the
5 Second Amended Complaint. ("Order," Dkt. No. 37). Plaintiff was
6 expressly cautioned that if he elected to stand on his defective
7 Second Amended Complaint instead of filing a Third Amended
8 Complaint, the defective claims in the Second Amended Complaint
9 would be subject to dismissal. (Id. at 2). Plaintiff was also
10 warned that if he failed to file either a Third Amended Complaint
11 or a declaration of his intention to stand on the defective Second
12 Amended Complaint by the Court's extended deadline, the entire
13 action would be subject to dismissal for failure to prosecute and
14 obey court orders pursuant to Federal Rule of Civil Procedure
15 41(b). (Id.) (citing Applied Underwriters, Inc. v. Lichtenegger,
16 913 F.3d 884, 891 (9th Cir. 2019) ("The failure of the plaintiff
17 eventually to respond to the court's ultimatum -- either by
18 amending the complaint or by indicating to the court that it will
19 not do so -- is properly met with the sanction of a Rule 41(b)
20 dismissal.'") (emphasis omitted; quoting Edwards v. Marin Park,
21 Inc., 356 F.3d 1058, 1065 (9th Cir. 2004)).

22
23 The Court's extended deadline has passed, and Plaintiff has
24 filed neither a Third Amended Complaint nor a declaration of his
25 intent to stand on the defective Second Amended Complaint. There
26 is no pending operative complaint, and there has not been one for
27 over seven months, since the Court's dismissal of the Second
28 Amended Complaint with leave to amend on June 15, 2019. The Court

1 has given Plaintiff multiple opportunities to file a Third Amended
2 Complaint and has ordered Plaintiff to do so, but he has refused
3 to comply. Nor has Plaintiff requested another extension in which
4 to file a Third Amended Complaint, or even acknowledged that he
5 must file a Third Amended Complaint if he wishes to move forward
6 with this action. Accordingly, despite the Court's several
7 attempts to afford Plaintiff the opportunity to state a claim,
8 Plaintiff has refused to participate in his own litigation.

10 II.

11 DISCUSSION

12
13 Federal Rule of Civil Procedure 41(b) grants district courts
14 the authority to dismiss actions sua sponte for failure to
15 prosecute or failure to comply with court orders. See Link v.
16 Wabash R.R., 370 U.S. 626, 629-31 (1962) ("The power to invoke this
17 sanction is necessary in order to prevent undue delays in the
18 disposition of pending cases and to avoid congestion in the
19 calendars of the District Courts."). Dismissal, however, is a
20 harsh penalty and is to be imposed only in extreme circumstances.
21 See Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

22
23 In considering whether to dismiss an action for failure to
24 prosecute, the Court must weigh five factors: "(1) the public's
25 interest in expeditious resolution of litigation; (2) the court's
26 need to manage its docket; (3) the risk of prejudice to
27 defendants/respondents; (4) the availability of less drastic
28 alternatives; and (5) the public policy favoring disposition of

1 cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642
2 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61
3 (9th Cir. 1992)). The Ninth Circuit will "affirm a dismissal where
4 at least four factors support dismissal, or where at least three
5 factors strongly support dismissal." Dreith v. Nu Image, Inc.,
6 648 F.3d 779, 788 (9th Cir. 2011) (quoting Yourish v. Cal.
7 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)).

8
9 **A. The Five Factors Support Dismissal**

10
11 **1. Expeditious Resolution And The Court's Need To Manage**
12 **Its Docket**

13
14 In the instant action, the first two factors -- the public's
15 interest in expeditious resolution of litigation and the Court's
16 need to manage its docket -- strongly favor dismissal. Pursuant
17 to the Court's sua sponte extended deadline, Plaintiff was required
18 to file a Third Amended Complaint or a declaration of his intention
19 to stand on the defective Second Amended Complaint by February 11,
20 2019 if he wished to pursue this action. (Order at 2). Despite
21 the Court's warning that the failure to file one of these two
22 documents would subject this action to dismissal with prejudice,
23 Plaintiff has failed to comply with the Court's Order or to request
24 an extension of time in which to do so. Plaintiff's conduct hinders
25 the Court's ability to move this case toward disposition and
26 indicates that Plaintiff does not intend to litigate this action
27 diligently. As a result, the first two factors favor dismissal
28 here. See Ash v. Cvetkov, 739 F.2d 493, 496-97 (9th Cir. 1984)

1 (affirming dismissal of action for failure to prosecute where
2 plaintiff's failure to respond to a court order resulted in a
3 month-long delay).

4 5 **2. The Risk Of Prejudice To Defendants**

6
7 The third factor -- prejudice to Defendants -- also favors
8 dismissal. "Unreasonable delay is the foundation upon which a
9 court may presume prejudice." Southwest Marine Inc. v. Danzig,
10 217 F.3d 1128, 1138 (9th Cir. 2000); see also Pagtalunan, 291 F.3d
11 at 643 (unnecessary delay caused by plaintiff's inaction
12 "inherently increases the risk that witnesses' memories will fade
13 and evidence will become stale"). The risk of prejudice to a
14 defendant is related to the plaintiff's reason for failure to
15 prosecute an action. See id. at 642. Where a party offers a poor
16 excuse for failing to comply with a court's order, the prejudice
17 to the opposing party is sufficient to favor dismissal. See
18 Yourish, 191 F.3d at 991-92.

19
20 Plaintiff has not offered any excuse for his failure to file
21 a Third Amended Complaint or a declaration of his intention to
22 stand on the defective Second Amended Complaint by the Court's
23 deadline. Accordingly, the risk of prejudice to Defendants favors
24 dismissal.

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1 **3. Less Drastic Alternatives**

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3 The fourth factor -- the availability of less drastic
4 alternatives -- also favors dismissal. The Court attempted to
5 avoid outright dismissal of this action by granting Plaintiff an
6 opportunity to file a Third Amended Complaint and by extending the
7 deadline for him to do so on multiple occasions. (Order at 2; see
8 also Dkt. No. 20). The Court expressly warned Plaintiff that the
9 failure to comply would subject this action to dismissal with
10 prejudice pursuant to Federal Rule of Civil Procedure 41(b). (Id.
11 at 12); see also Henderson, 779 F.2d at 1424 ("The district court
12 need not exhaust every sanction short of dismissal before finally
13 dismissing a case, but must explore possible and meaningful
14 alternatives."). Nonetheless, Plaintiff failed to comply with the
15 Court's Orders. Alternatives to dismissal do not appear to be
16 appropriate given Plaintiff's failure to participate in his own
17 litigation.

18
19 **4. Public Policy Favoring Disposition On The Merits**

20
21 The fifth factor -- the public policy favoring the disposition
22 of cases on their merits -- ordinarily weighs against dismissal.
23 See Dreith, 648 F.3d at 788. However, it is the responsibility of
24 the moving party to prosecute the action at a reasonable pace, and
25 to refrain from dilatory and evasive tactics. See Morris v. Morgan
26 Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991). Here, despite
27 the Court's express warnings about the possibility of dismissal,
28 Plaintiff has failed to discharge his responsibility to prosecute

1 this action. Under these circumstances, the public policy favoring
2 the resolution of disputes on the merits does not outweigh
3 Plaintiff's failure to file a Third Amended Complaint or a
4 declaration of his intention to stand on the defective Second
5 Amended Complaint.

6
7 **B. Dismissal Of This Action Is Appropriate**

8
9 For the above-stated reasons, the Court concludes that
10 dismissal of this action is warranted under Rule 41(b), which
11 states:

12
13 [A] dismissal under this subdivision (b) and any
14 dismissal not under this rule -- except one for lack of
15 jurisdiction, improper venue, or failure to join a party
16 under Rule 19 -- operates as an adjudication on the
17 merits.

18
19 Fed. R. Civ. P. 41(b).

20
21 The Court is dismissing this action due to Plaintiff's failure
22 to prosecute and obey Court orders. As this ground for dismissal
23 does not fall into one of the three exceptions noted above, the
24 dismissal will operate as an adjudication on the merits. The
25 dismissal is therefore with prejudice to Plaintiff's refiling a
26 new action in federal court based on the same allegations. See
27 Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002)

1 (dismissal interpreted as an adjudication on the merits unless one
2 of the Rule 41(b) exceptions applies).

3
4 **III.**

5 **CONCLUSION**

6
7 **IT IS ORDERED** that Judgment shall be entered dismissing this
8 action with prejudice.

9
10 **IT IS FURTHER ORDERED** that the Clerk serve copies of this
11 Order and the Judgment herein on Plaintiff at his current address
12 of record.

13
14 LET JUDGMENT BE ENTERED ACCORDINGLY.

15
16 IT IS SO ORDERED.

17
18 DATED: February 20, 2019

19 
20 OTIS D. WRIGHT II
21 UNITED STATES DISTRICT JUDGE

22
23 PRESENTED BY:

24
25 /s/
26 SUZANNE H. SEGAL
27 UNITED STATES MAGISTRATE JUDGE
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